The Central Law Journal.

SAINT LOUIS, SEPTEMBER 5, 1879.

CURRENT TOPICS.

A curious phase of the law as to representations which influence another's conduct, is seen in the recent English case of *Dashwood v. Jennyn*, 27 W. R. 868, which decides, in substance, that, if a representation be made by A to B, on the faith of which C acts, A can not be held liable. The facts of this case were these: The plaintiff, who was a captain in the army, was engaged to and desirous of marrying one Miss Marshall, but her parents objected on account of the smallnesss of his income. At this juncture the captain became acquainted with a rich old gentleman named Richards, who took a great liking to him, and endeavored to obtain him a position with a salary large enough to satisfy the views of the elder Marshalls. Failing in this, he wrote to the plaintiff: "I have been thinking what a hard case yours is, and as there seems no chance of your obtaining an appointment, and as Mrs. Marshall is determined on that account to break off the engagement at once, rather than that should happen, I tell you what I will do for you. I will allow you £500 a year, and as that will cease at my death, I will leave you £10,000." This, together with a written agreement to that effect, signed by Mr. Richards, being shown to the parents, their consent was obtained and the parties were married. The plaintiff received one installment of the £500, but before the rest became due Richards died, without making any provision in the will. It was held that an action would not lie, upon the agreement, against his estate. "The plaintiff," said BACON, V. C., has endeavored to show that the relief sought comes within a principle of law that is well established. That principle, stated in its naked form, is this: That a representation made by one party for the purpose of influencing the conduct of another party, and acted upon by him, must be made good by the person making the representation, no matter what the nature of the representation be. All the cases cited are founded on, and are instances of, that principle. But there is no case in which the person making the representation or promise has not been brought face to face with the person to whom the promise is made. In the present case there is nothing to connect the promise made to Captain Dashwood with the engagement entered into by the testator." * * * It is impossible to bring this claim within any principle of law. The paper relied on does not even purport to be binding, and is a mere *nudum pactum*."

IN *Shepherd v. Whetstone*, decided by the Supreme Court of Iowa at its last term, the defendant had signed a note as joint maker, though in reality a surety. While the note was in the hands of the payee, the note was changed by inserting an interest provision in the blank left for naming the place of payment. It was afterwards erased, the note restored to its former condition, and then transferred for value, before maturity, to an innocent holder. The Supreme Court held that, though the note showed marks of erasure, it was valid in the hands of the innocent holder. ADAMS, J., said: "This alteration, if it had been allowed to remain, was certainly sufficient to invalidate the note in the hands of the payee. The question presented is as to whether the fact that the words constituting this alteration were erased, and the note transferred to the plaintiff, is sufficient to enable him to recover, notwithstanding the alteration. When the note is restored, as in this case, to its original form, it expresses the precise contract which the parties entered into, and the objection, if any, to enforcing such contract, must rest upon grounds of public policy, and not upon the necessity of protecting the maker in the individual case. That there is, upon grounds of public policy, a valid objection to enforcing, under some circumstances, a contract which has been altered, notwithstanding its restoration, seems to be well settled. This is so where the alteration is made with intent to defraud, and the instrument remains in the hands of the person making the alteration. Perhaps, indeed, it should be so held in the absence of any intention to defraud. Hall v. Henry, 19 Iowa, 523. See, however, 2 Parsons on Notes and Bills, 270. But conceding that the importance of discouraging the alteration of instruments is such that

a court is justified in declaring invalid an instrument which has been altered, and which remains in the hands of the person who made the alteration, notwithstanding the restoration of the instrument, it is evident that it should not be held invalid in the hands of an innocent purchaser for value. The punishment of an innocent person for an act done by another, has no tendency to subserve the public interest, or promote the public security. That the plaintiff is a purchaser for value is not denied. Whether he purchased with notice that the instrument had been altered, admits of some question. He had notice, of course, of what appears upon the face of the instrument, and it is insisted by the defendant that the instrument reveals an erasure, in proof of which the instrument itself has been submitted to our inspection. There does not appear, manifestly, an erasure. But an erasure is not necessarily an alteration. It is so only when made subsequent to delivery. Now, while the erasure was in fact made subsequent to the delivery, we see nothing upon the face of it to indicate that it was not made before. This, to be sure, is denied by the defendant. He insists that the words erased appear to have been written with different ink from that used in the other written parts of the instrument. A very close inspection would probably reveal that they were; but even, if so, we think the fact such that it would ordinarily have passed the observation of the most prudent person. All that can be said, then, is, that certain words appear to have been erased. Whether it should have been inferred that the words were erased subsequent to delivery, would depend much upon what would be the reasonable inference as to what the words were. The blank was left for the name of the place at which the note should be made payable. This blank was filled with certain words which were afterward erased. This was all that the plaintiff could see. The reasonable inference was that the note, as first drawn, was made payable at a particular place, and afterward, by erasure, was made payable generally. We see nothing in this to indicate that the erasure was not made before delivery. But the defendant insists that, conceding that such was the reasonable inference, there was enough in the mere fact of erasure to put the plaintiff upon inquiry. But this doctrine, in our opinion, has no application. A person is put upon inquiry only when he has reason to apprehend that the claim which he is about to acquire will conflict with another person's substantial rights. But the instrument in this case, can not, as we have seen, be declared invalid upon the ground that the defendant's just protection requires it; the contract expressed by it being precisely the contract which he entered into. In our opinion the plaintiff may be regarded as purchasing without notice of the alteration; and we see nothing in the demands of public policy which would require that a loss should be imposed upon him, and the defendant be allowed to escape a just liability."

PRINCIPAL AND ACCESSARY.

I.

Recent statutes, in many states, have abolished the common law distinction between principals and accessaries before the fact, and have prescribed that an accessary before th fact, or "instigator," which is the term frequently used, shall be regarded as principal, to be indicted and tried as such. The effect of these statutes has been to establish the modern Roman law, as it obtains in France and Germany, in the place of our old common law. It may not be without interest, therefore, to notice some of the conclusions of French and German jurists on this important topic; and of these I select only such as are sustained, or are likely to be sustained, in our own courts.

Relative Culpability of Instigator and Perpetrator. The question of the comparative criminality of instigator and of perpetrator has been much discussed. On the one side it has been argued that instigation from the nature of things involves more design, premeditation, coolness, and intelligence than does perpetration. The instigator bears to the perpetrator the relation of the seducer to the seduced; of Iago, it may be, to Othello; of Mephistopheles to Faust. The instigator would have perpetrated the crime anyhow; the perpetrator would not have perpetrated it without the instigation. To this it is answered that instigation does not necessarily involve premeditation, but that premeditation

is necessarily involved in perpetration. Instigation may consist in the expression of a momentary petulant desire, as was the case with Henry II., when saying he wished he was rid of Becket, or of advice which the adviser himself never expected to have embodied in action. Perpetration, on the other hand, when in obedience to a plan previously entertained, involves not merely premeditation, but action as a realization of this premeditation. Not only is the criminal design harbored, but it is unflinchingly matured and executed. Nor is the relation of instigator and perpetrator always that of seducer and seduced. The relation may be that of confederate with confederate. Each enters into the partnership of crime; and the chief difference between the two is that the instigator is not present at the act which the perpetrator commits. The perpetrator may be as much the seducer of the instigator, as the instigator of the perpetrator. Henry's barons, in taunting him with Becket's insults, and offering themselves as the avengers of those insults, may have been the tempters who led Henry to utter the fatal wish, and thus have been the original planners as well as the final perpetrators of the crime to which he gave a hasty intermediate assent. "Instigation" does not necessarily involve "origination." The accessary before the fact may be really the agent of the principal. To this it is rejoined that what we have to do with is instigation in its logical sense, as the origination of a crime to be effected through another; and that this involves a double criminality, that of the instigator himself and that of the perpetrator; that the instigator is in this respect a free agent, bringing into effect an act doubly criminal as infringing the rights of the object of the crime, and as steeping in guilt its agent.—Such are the arguments on both sides of this important issue. The conclusion generally arrived at is that instigator and perpetrator are involved in an equal guilt; that the instigator is to be regarded as having joined in the perpetration of the act, and the perpetrator as having joined in its instigation. Hence, in our most recent codes, accessaries before the fact are treated as principals.

Metaphysical Difficulties Involved. The doctrine of accessaryship involves one of the most difficult questions of metaphysics, that of the reconciliation of freedom of will with necessity. If the will is free, how can we punish the instigator of a crime as equally guilty with the perpetrator? The latter it is assumed, acted with perfect freedom; we may therefore punish the instigator for giving bad counsel, as we would punish the publishers of bad books, but we cannot charge him with doing an act at whose commission he was not present, which he had no power to order, but whose performance is imputable to the free and independent will of another person. On the other hand, if the will is necessitated, we certainly cannot punish the agent whose action is determined by another. But, illogical as it may be, we punish both. Each, we say, is responsible for the act, and by no other view could public justice be subserved. Unless the perpetrator is responsible, there is no law by which injuries can be redressed; unless the instigator is responsible, there is no law by which right can be vindicated. In other words, if the perpetrator is not made responsible there can be no retribution for wrong acts; if the instigator is not made responsible there can be no retribution for wrong agents. In the one case there would be no responsibility for conduct, in the other there would be no responsibility for impulse. We therefore punish the instigator as if he were free while the perpetrator was coerced, while we punish the perpetrator as if he were free and the instigator did not exist. Nor is this strange, for the same solution is accepted by us in all other lines of moral judgment. We condemn the tempted, when he yields on the ground that he yields voluntarily; we condemn the tempter on the ground that he caused the yielding. Sir W. Hamilton treats this as one of the illustrations of the practical harmony between the necessity and free will. If we reject determinism there is no law by which man can be ruled; if we reject free agency there is no man to be ruled by the law. And in our doctrine as to principal and accessary, we treat the principal both as free and as coerced; as free when we prosecute him individually, as coerced when we prosecute his instigator.[1]

(1) "The topic, in this connection, has been discussed by Volkmann, Grundriss der Psychologie,

Instigation Must be Causal. To convict a person of instigating a crime, as an accessary before the fact (or, under recent statutes, as principal), it is necessary to show that the motives applied for the purpose by the instigator co-operated in inducing the perpetrator to commit the crime. When the question of *punishment* comes up, it is not unimportant to inquire to what extent the perpetrator was overborne by the superior will of the instigator, and how far the latter is to be considered as the exclusive contriver of the crime. As has been well said, when a bandit, whose trade is assassination, offers himself for this purpose to a rich signior, the case is very different from that of an unsophisticated and comparatively innocent agent who is led into a path of guilt he never would otherwise have approached by the protracted and subtile wiles of a Mephistopheles.[2] A distinction, also, is to be made between a single hasty and ill-considered word, (as was alleged by Queen Elizabeth to have been the case with her order for the execution of Queen Mary,) and a chain of cool and deliberate directions. But these distinctions do not go merely to the question of degree of punishment. The amount of potency with which the instigation was applied, has much to do with determining whether there was really a causal relation between the instigation and the criminal act. The former may have been merely a strong expression of enmity, or a strong opinion as to the right to do a particular thing, without any intention that the criminal act should result from the expression. If so, the criminal act is not imputable to the alleged instigator.

Necessary Accessaryship. There is a class of cases in which a certain number of offenders is necessary to constitute the offence. To riot, for instance, three offenders are necessary; to conspiracy, to duelling, two. In such cases we have what is called *concursus necessarius plurium ad idem delictum;* and the question has been agitated, whether all offenders going to make up the requisite quorum in such cases are not necessarily principals. Undoubtedly they must be. But this is no reason, as has been sometimes argued, why persons instigating such offences,,—e. g. duels,—should not be distinctively indictable.

Coerced Perpetrators. Whether a person compelled by fear to execute the commands of an absent instigator is to be regarded as personally responsible, or whether he is irresponsible and the instigator is responsible as principal, is a question as to which German jurists have been divided. The question, in fact, is primarily one of psychology. By philosophers, both of the idealistic and the Scotch common sense schools, persons acting under threats are nevertheless supposed to exercise choice in so acting; and such is the tendency of a well known passage of the jurist Paulus. (Coactus volui, I, 21, § 5 D, *quod metus*). This is in antithesis to mechanical coercion, under which persons are supposed to act as parts of a machine. On the other hand, adherents of the materialistic philosophy hold that when the threats induce a volition, but when the party threatened is not in a condition to set up a resisting volition of his own, the acquiescing volition is not imputable to him, as he is without psychical freedom. In such case the instigator or accessary before the fact is the real principal. It has been even held that necessity (psychische Unfreiheit) is to be arbitrarily assumed whenever an unusual degree of moral power is required to resist the threats. The doctrine therefore is intimately connected with that which underlies the doctrine of self-defence. For authorities on the determinist or necessitarian side of this issue, see Geyer, Holtz. Strafr. II, 343. But the preponderance of German authority is that a person acting under threats is a free agent and principal, and that the defence of threats goes only to punishment and not in bar; and hence that the instigator, not present at the offence, is not to be regarded as principal, unless it be so required by statute. Berner, Theilnahme, 283.

Ignorant Principals. He who intentionally uses the ignorance of another as the means of effecting a crime is principal and not accessary. That this is the case with one employ-

1856, p. 374, 397; Wahlberg, das Princip der Individualisierung in der Strafrechtspflege, and by Drobisch, in die moralische Statistik und die menschliche Willensfreiheit, p. 28. See Geyer in Holzendorff's Strafr. II, 340, who takes the necessitarian side of the controversy.

(2) Geyer, in Holtz. Strafr. 353.

ing an idiot or a madman to commit a crime, is conceded; and the principle may be extended to a party who uses for the same purpose another person's ignorance of fact. Thus he who induces another to believe a robber is approaching, causing such other to shoot an innocent person, is principal in the murder.

Decoys. Are decoys, or, to use the French designation, the *agents provocateurs*, liable as instigators? They no doubt instigate or *provoke* the crime; but the essential element of *dolus*, or malicious determination to violate the law, is wanting in their case. And it is only the *formal* and not the *substantial* part of the crime that they provoke. They provoke, for instance, in larceny, the asportation of the goods, but not their ultimate loss by the owner. They may be actuated by the most unworthy of motives, but the *animus furandi*, in larceny, is not imputable to them; and it is in larcenous cases or cheats alone that their employment can be conceived. For, should they act as instigators of an irreparable crime, (e. g. murder,) they may become liable as accessaries to the crime. They may also become liable for negligence in their conduct, when it leads to injuries which prudence on their part might have avoided; as when they instigate an ambush which results in a homicide.

Instigator's Responsibility for Excess in Conduct of Perpetrator. Suppose the perpetrator, undertaking to execute the purpose of the instigator, commits acts, while performing his mandate, in excess of such purpose. Is the instigator responsible for the excess?

If we relied solely on the analogies from the civil side of the law, we would say that the principal or master is liable for all such acts when done in the discharge of the agency or service, though these acts were expressly forbidden by the principal or master. This rule holds good on the criminal side of the law, so far as concerns indictments for negligence. But it cannot be extended to indictments for malicious acts. A. counsels B. to commit a specific crime. B., in committing this crime, maliciously commits another collateral crime, not within the scope of A's counsel, and it may be forbidden by A. A. cannot, at common law, be convicted of doing intentionally, and maliciously, this collateral act, which he never intended, and which he had even forbidden. Of *negligence* in putting these powers in his agent's hands, or of negligence as incidental to the working of the illegal instrumentality he put in motion, he may be convicted, but not of designing something he did not design. Of negligence he may be certainly convicted if the crime, though unforeseen by him, is incidental to one procured by him: as when he sends a servant out to steal property in the night, and the servant, in striking a match, sets fire to the house.

Quantitative variations in the mode of executing a crime are not to be viewed as excesses in the sense above stated. A homicide, for instance, is imputable to the instigator, though executed with a cruelty in excess of that commanded. So, if A. directs B. to inflict on C. an injury whose probable consequences will be death, A., as we have seen, is as chargeable, if death ensues, as is B., with the homicide. As to *minor* crimes, it has been generally said that instigation to commit a greater crime covers instigation to commit a lesser crime. If A., for instance, counsels B. to commit highway robbery, which results in larceny, A. is accessary before the fact to the larceny. But it is otherwise as to minor offences not included in the major. Thus counselling to commit larceny would not involve accessaryship to the offence of cheating by cards, though part of the same transaction,

As is seen above, the accessary before the fact is not liable for any malicious excursions made, outside of the range of the employment, by the perpetrator. It should be remembered, however, that the instigator may often use ambiguous terms: "Get me this thing anyhow;" or, "Bring me this man alive or dead." If so, the instigator is chargeable with any misconstructions the ambiguity may produce. It is in this sense that James II. and Louis XIV. are chargeable with instigation in the attempted assassinations of William III.

(To be continued.) F. W.

Where an undertaking provided that a party thereto should be liable only after all legal means to collect the note, with reference to which it was given, had been exhausted: *Held*, in an action thereon, that it was necessary to show that all legal steps had been taken, and that it was not sufficient to show that they would be fruitless if taken.—*Schermerhorn v. Conner.* Supreme Court of Michigan.

INFANCY—CONTRACT OF SERVICE.

SPICER v. EARL.

Supreme Court of Michigan, June Term, 1879.

An infant is bound by his contract of service so far as he has executed it without dissent, when not fraudulent or unreasonable.

COOLEY, J., delivered the opinion of the court.

Earl sued Spicer to recover for services as a miller. The services commenced July 5, 1877, and continued until May 14, 1878. Earl claims to have been an infant until March 8, 1878. He, however, made the contract of service on his own behalf, and it does not appear that Spicer knew he was under age. When Earl left the service of Spicer, in May, the parties attempted to settle, but failed. Earl claimed that the contract between the parties had been that he was to be paid one dollar a day for his services, and to have his board. Spicer admitted that this was the first arrangement, but claimed that it had been subsequently changed and the wages reduced. Earl had had his board for the whole period and some payments in money, and there is nothing in the records to indicate that he had at any time repudiated the contract as he understood it. On the contrary, he seems to have continued to work under it for more than two months after he came of age, and only dissented from it after the failure to settle. He then brought suit on a *quantum meruit*.

The circuit judge instructed the jury that, if the plaintiff was an infant when he made the contract for service, he was not bound by it, and could collect the value of his services for the time he worked, unless he had affirmed it after coming of age, and he submitted it to the jury to determine whether anything had been done by him after coming of age by way of affirming or ratifying. The verdict ind cates that the jury gave the plaintiff what they believed was the value of his services, and disregarded the contract.

The principle laid down in the case of Squires v. Hydliff, 9 Mich. 274, governs this case. It was there held that an infant was bound by his executed contract of service if it was reasonable und e all the circumstances, or not so unreasonable as to be evidence of fraud or undue advantage. It is true the contract in that case was one for necessaries exclusively, while this was for necessaries only to the extent of the board; but the fact that something more was to be paid to the infant is not very important. Family servants and many others are commonly employed on the same terms as was this infant. It would be absurd, as well as mischievous, that the right to disaffirm should depend on the circumstances that the employer was to pay something besides the servant's support. It was well said by Justice Christiancy, in the case mentioned, that "it is essential to the protection of infants that they should be bound by contracts of this kind, after they have been executed, and this idea of protection lies at the basis of the whole law of infancy. Should the law recognize the right of repudiation in such cases, no man could furnish an infant with the necessaries of life in compensation for his services without the risk of a law suit, and the minor, though able and willing to earn his support, would often be deprived of the opportunity, and driven, perhaps, to vagrancy and crime."

No better illustration of the truth of what is here said can be had than this case presents. This infant was upwards of twenty years of age when he hired out his services, and there is no pretense that he did not understand the current wages, or act with entire independence in making his bargain. There is no reason to suppose he was overreached. If the employer testifies to the truth, his business was entirely unremunerative, and the employment was more likely a favor to the employed than to the master. Had the latter understood that he was subject to the liability, after the labor had been performed, to be called upon to pay for it any price that might be made out on the judgment of others, he would have refused to employ the infant at all, and the latter would have gone without employment—or at least without wages—because any one who should promise him more than the necessaries of life might be compelled to pay him an indefinite price, to be fixed afterwards by a jury, with costs in addition. Prudent men would not give employment under such circumstances, especially at a time when labor is not at all in demand, and when employment at anything more than one's board is often a matter of kindness and favor. Such a time has been within the experience of many persons within the last five or six years.

It is a harsh rule which permits the infant to repudiate his contract after he has executed it, where no advantage has been taken of him, and where the party dealing with him was not aware of his infancy. Where only the infant's services are in question the rule should not be extended beyond what is absoluely necessary to proper protection; it should not be allowed to become a trap for others, by means of which the infant may perpetrate frauds. If a contract for service is apparently fair and reasonable under the circumstances, the infant who has performed it should be held to its terms, and, if he attempts to repudiate it, the attention of the jury should be directed to the question whether or not an unfair advantage has been taken of him, instead of their being required to find a subsequent affirmance. So long as the employer who is acting in good faith is not notified of any dissent, he has a right to understand that his responsibility is measured by his agreement.

On the other hand, the infant may abandon the service when he pleases, or stipulate for any new terms he may see fit to demand and can procure assent to. He is bound by the terms of the contract so far as he executes it without dissent, but no further. But we have no hesitation in saying that, if evidence of affirmance of the contract were required, the jury ought to have found it in this case in the fact of the service being continued without demand for increased wages, after the infant came of age.

Whether the wages were reduced or not by the

action of the parties, is a question on which they disagreed, and which must go as a disputed fact to another jury. Spicer testified that he found he could not afford to pay wages as originally agreed, and notified Earl that if he continued in his employ he should pay thereafter only ten dollars a month, and that Earl continued to work for him without notifying him that he should claim more. If the jury should find this to be the fact, it would constitute a new arrangement, and the recovery should be limited accordingly.

The judgment must be reversed, with costs, and a new trial ordered. The other justices concurred.

NEGLIGENCE — FIRES CAUSED BY LOCOMOTIVES — PROXIMATE AND REMOTE CAUSE.

LEHIGH VALLEY R. CO. v. McKEEN.

Supreme Court of Pennsylvania, May, 1879.

Sparks of fire thrown from defendants' engine set fire to combustible materials alongside of the railroad on land adjoining the plaintiff's strip of land, on which were piles of lumber, the property of the plaintiff; the fire was transmitted to combustible materials, leaves, brush, etc., on said strip of land, and by force of a high wind to the lumber. *Held*, that the question of remoteness or proximity was a question of fact for the jury. Hoag v. Lake Shore, etc. R. Co., 82 Penn. St. 293; Pennsylvania R. Co. v. Hope, 80 Penn. St. 373; and Pennsylvania R. Co. v. Kerr, 62 Penn. St. 353, examined and distinguished.

Error to the Court of Common Pleas of Northampton county.

Case by Thomas L. McKeen against the Lehigh Valley Railroad Company, for damages for the alleged negligence of defendants in setting fire to certain lumber piles of plaintiff, situate near defendants' track. It appeared that plaintiff's lumber was piled on both sides of a switch running out from defendants' road; that on May 4th, 1870, as an engine and train of defendants were passing, sparks were thrown from the engine to a point alongside of defendants track, on land adjoining the plaintiff's, about three hundred feet from the lumber, set fire to combustible materials, consisting of leaves, briars, brush, stumps and logs, burning the same in its pathway, until it reached the plaintiff's lumber, which it entirely consumed. The weather was dry and a high wind was blowing in the direction of the property destroyed. The verdict was for plaintiff for $9,609.20, and judgment. Defendants took this writ, filing *inter alia*, the following assignments of error:

1. The court erred in answering in the affirmative the plaintiff's fifth point, which was as follows: 5. That whether the setting of brush, logs and stumps on fire by defendants' locomotive was the proximate cause of the destruction of the plaintiff's lumber, is a question of fact for the jury.

2. The court erred in answering, as they did, the defendants' fourth point, which was as follows: 4. There being no proof of any want of care on the part of the defendants in the character of the spark arrester used on the locomotive, which is alleged to have caused the fire that destroyed the plaintiff's lumber, or that there was any want of care and vigilance in running the train, there can be no recovery in this action. Answer: This point we can not affirm. To do so we would have to take the case from the jury and direct a verdict in favor of the defendants. The concluding clause in the point is substantially correct, as there is little, if any, evidence, that there was any want of care and vigilance in running the train at the time of the fire, but we can not say, as alleged in the remaining part of the point, that there is no proof of any want of care on the part of the defendants in the character of the spark arrester used in the locomotive which is alleged to have caused the fire that destroyed the plaintiff's lumber, or that it was in a defective condition at the time of the fire. The proof submitted by the plaintiff bearing on the said questions of fact, is of such a character as to entitle it to be considered by the jury, whose province it is to determine said questions of fact from all the evidence in the case.

4. The court erred in answering, as they did, the defendants' seventh point, which was as follows: 7. It was negligence *per se* on the part of the plaintiff to permit the combustible material composed of dried leaves, briars, brushes, logs and stumps, to remain on his own land within twenty feet of his lumber piles, and as it is the undisputed testimony that the fire was communicated to his lumber by means of this combustible material, he can not recover in this action. Answer: Not affirmed.

5. The court erred in answering, as they did, the defendants' eighth point, which was as follows: 8. It is the undisputed fact that the plaintiff's lumber was not fired by sparks from defendants' locomotive coming in direct contact with it; it is also the undisputed fact that the fire originated on the land of another, from which it was transmitted to combustible material on the land of the plaintiff, from which latter material it was communicated to plaintiff's lumber under the influence of an unusually high wind; in these circumstances the maxim, *causa proxima non remota spectatur* becomes applicable, and the plaintiff can not recover. Answer: If the jury find that some combustible material, though on the lands of another, were in the first instance set on fire by sparks or burning coal from defendants' locomotive, and the fire was transmitted to other combustible materials on lands of the plaintiff, and by means of the latter materials to the plaintiff's lumber, in such case the jury must determine whether such facts constitute a continuous succession of events so linked together as to be a natural whole, or whether the chain is so broken as to become independant, and the final result, to wit, the burning of plaintiff's lumber, can not be said to be the natural and probable consequence of the setting on fire the combustible materials in the first instance by the sparks or burning coals from defendants' locomotive. The rule

for determining what its proximate cause is, that the injury must be the natural and probable consequence of the act in the first instance, and that it might and ought to have been foreseen under the circumstances.

7. The court erred in answering, as they did, the defendants' tenth point, which was as follows: 10. Under all the testimony in the case, there is not sufficient evidence to prove that the engine of the defendants occasioned the fire which destroyed the plaintiff's lumber, and that it was by reason of any negligence on the part of defendants, and therefore the verdict must be for the defendants. Answer. Not affirmed.

8. The court erred in answering, as they did, the defendants' eleventh point, which was as follows: 11. Under all the evidence in the cause the verdict must be for the defendants. Answer: Not affirmed.

9. The court erred in charging the jury as follows, to wit: "The allegation of the plaintiff is that the sparks of fire thrown from the engine set fire to the combustible materials alongside of the defendants' road, on land adjoining the plaintiff's strip of land on which the lumber was piled; that the fire was then transmitted to combustible materials, such as leaves, briars, brush, stumps and logs, on said strip of land, and by the force of a high wind, to his lumber. The defendants' contend that, under such circumstances and conditions, the throwing of sparks of fire by the engine was not the immediate or proximate cause of the injury to the plaintiff's lumber. *This is a question of fact for you.*" The part in italics is assigned for error.

10. The court erred in charging the jury as follows: "It is an undisputed fact that the plaintiff not only purchased the strip of land between the two railroads, but that he piled his lumber there, after the defendant's railroad was built and in operation; that this strip of land was covered with combustible material, such as briars, leaves, brush, stumps, logs, and broken down trees, and that he failed to remove them, except a space of the width of from sixteen to eighteen feet around the lumber piles. It is contended on the part of the defendants that these circumstances constituted negligence on the part of the plaintiff, and that if they contributed to the injury the plaintiff can not recover. We can not so instruct you. Though you should find as a fact that the combustible material on plaintiff's land of the character described by the witnesses, contributed to the injury, nevertheless the plaintiff was under no legal obligation to remove them as against the negligent act of defendants."

TRUNKEY, J., delivered the opinion of the court:

However severe animadversions are sometimes made upon juries, the courts are bound to consider their rights in the trial of causes. The organic law secures to the people trial by jury as it was at common law, and nothing is more offensive in the administration of justice than for the judge to usurp the disposition of facts. Where there is no evidence of a disputed fact, or a mere scintilla, the question should not be submitted; but it must be where there is sufficient evidence to warrant its finding, and its determination is exclusively for the jury. If a fact in the opinion of the judge be proved by clear and uncontradicted oral testimony, he may advise, not command, the jury to find it. They may disbelieve the witnesses though he credits them, and they may understand the testimony differently from him. When a fact essential to the maintenance of a cause is not established by proof, the judge may order a non-suit or direct a verdict for defendant; and when the requisite facts are agreed upon or admitted, he may instruct a finding for plaintiff. These trite principles, called to mind by the line of argument, seem to have been remembered by the learned judge, and they forbid reversal in absence of error in his rulings upon legal questions. If, indeed, it be true that a prejudice exists affecting jurors in a class of cases, elsewhere it might be profitable to inquire into the causes and the means for its removal.

The chief complaint in this case is: "The question of remoteness or proximity was referred as a question of fact to the jury." How it could have been otherwise, without disregarding the authority of Pennsylvania R. Co. v. Hope, 80 Penn. St. 373, is difficult to comprehend. There the fire was dropped on a cross tie of the track, "and running into a small heap of dry grass that had been cut and pulled, and thrown into a pile in the fall before, was carried thence by means of rubbish and dry grass on the company's ground across the roadway to the fence, which was fired, and thence across to grass fields, burning the dry grass in its pathway until it reached the plaintiff's fence and woodland, about six hundred feet from the railroad, burning the fence and a large part of the woods. The weather was dry and windy, and the direction of the wind was strongly towards the plaintiff's fields and woods." Here the sparks were thrown from the engine to a point alongside of defendant's track in land adjoining the plaintiff's, about three hundred feet from the lumber, set fire to combustible materials, consisting of leaves, briars, brush, stumps and logs, burning the same in its pathway till it reached the plaintiff's lumber. The weather was dry, and a high wind was in the direction of the property destroyed. There the sparks fell on the track, and were communicated to the adjoining land by the dry grass negligently left by the company on its roadway. Here the sparks were thrown into the combustibles on the adjoining land. The fire reaching the combustibles on the land, was as sure to destroy in the one case as the other. It was held that the question of proximity was one of fact peculiarly for the jury. "How near or remote each fact is to its next succeeding fact in the continuation of circumstances from the prime cause to the succession of facts which is immediately linked to the injury, necessarily must be determined by the jury. These facts or circumstances constitute the case, and depend upon the evidence. The jury must determine, therefore, whether the facts constitute a continuous succession of events so linked together that they become a natural whole, or whether the chain of events is so broken that they become independent, and the final result can not be said to be the natural and probable consequence of the primary cause—the negligence of

the defendants. The rule concerning involuntary negligence, as distinguished from wanton or intentional injury, is explained in the maxim *causa proxima non remota spectatur*. * * * In all, or nearly all cases, the rule for determining what is a proximate cause is, that the injury must be the natural and probable consequence of the negligence, and that this might and ought to have been foreseen under the surrounding circumstances. These are the circumstances of the particular case, and from the nature of the thing, must be referred to the jury."

The portion of the charge alleged to be erroneous in the ninth assignment, immediately preceding the reading of the matter set forth in the fifth assignment, and placed in its proper order in the instructions to the jury, accords with the doctrine in Hope's case, and is nearly in the words there used. To have affirmed defendants' eighth point would have annulled that decision. The facts were not agreed upon nor admitted, and their finding was exclusively for the jury. Had the defendants added to those stated in the point another fact, namely, that the fire was transmitted by a continuous burning of the leaves and brush from the point of its origin to the lumber, the natural and probable consequence of defendants' negligence, the jury might properly have been told that upon such facts the cause was proximate, and plaintiff could recover. Or, instead, had it been added that there was no continuous burning, and the destruction of the lumber was not a natural result of setting fire to the leaves and brush, then, upon such facts, it could well have been affirmed that the maxim applied, and the verdict must be for defendants. A jury of the vicinage would understand the witnesses, and know quite as well how that fire would run in the dry leaves and brush on a windy day, as a judge learned in the law. Likely not one would hesitate in believing that there was no real break in the fire from its starting-point to the lumber, or that if it got within eighteen or twenty feet of the lumber the latter would burn. They could also determine whether dry weather and high winds in the spring-time are extraordinary, and whether, under these conditions, the continuous succession of events were such that the cause was naturally linked to the injury, and within the probable foresight of him whose negligence ran through from the beginning to the end.

It is contended that Hoag v. Lake Shore, etc., R. Co., 82 Penn. St. 293, in effect overrules the doctrine in Railroad v. Hope, and fully sustains and approves the ruling in Pennsylvania R. Co. v. Kerr, 62 Penn. St. 353. The opinion of the late Chief Justice in Hope's case, shows the marked distinction between that and Kerr's, and that the latter, upon its own facts, was unshaken. If the case of Hoag seems to support the one rather than the other, it is because of the greater similarity of facts. In Hoag v. Lake Shore, etc., R. Co., *supra*, the plaintiffs adduced the evidence upon which they framed their third point, praying instructions that if the jury believed the facts as therein stated, they were entitled to recover. The defendants conceded the facts, and the jury were told that, upon the facts in evidence, or as assumed in the plaintiff's third point, their verdict should be for defendants. Had the facts not been virtually admitted the instruction would have been bald error, and so held this court. Paxson, J., after referring to and quoting at some length from Railroad v. Hope, without a word of qualification or abatement of its force, says: "But it has never been held that, when the facts of a case have been ascertained, the court may not apply the law to the facts. This is done daily upon special verdicts, and reserved points. Thus, in Pennsylvania R. Co. v. Kerr, *supra*, a case bearing a striking analogy to this, the court submitted the question of negligence to the jury, but reserved the question of proximate cause upon the undisputed facts of the case; of course this could not have been done if the facts were in dispute. A reserved point must be based upon facts admitted in the case or found by the jury. In questions of negligence it has been repeatedly held that certain facts, when established, amount to negligence *per se*. * * * We may therefore regard the plaintiff's third point as a prayer for instructions upon the undisputed facts of the case." It thus appears that the authority of Railroad Co. v. Hope, *supra*, is in nowise shaken by the decision in a case where the plaintiffs complained that facts were not submitted which they themselves assumed to be true. Had the opposite party denied they were a full and fair statement, and the case had come on his complaint, the situation would have been altogether different. Or had the assumed facts been in dispute, and the point refused therefor, neither party could complain. In that case the ignited oil ran down the bank into the river, and was carried down the current on top of the water till consumed. On its way it set fire to the plaintiff's property. The water bearing it was an intervening agent, as would be the hand bearing a lighted torch. This court stated the rule for determining what is proximate cause, and said: "It would be unreasonable to hold that the engineer of the train could have anticipated the burning of the plaintiff's property as a consequence likely to flow from his negligence in not looking out and seeing the land slide." "It is manifest that the negligence was the remote and not the proximate cause of burning the plaintiff's building." Not so was it held where fire was negligently communicated to dry grass and fences in which the fire spread as it consumed, and was speeded in its progress by a strong wind. In the latter the question of proximity was one of fact for the jury, who must determine whether the injury was the natural and probable consequence of the negligence; such a consequence as under the surrounding circumstances of the case might and ought to have been foreseen by the wrongdoer as likely to flow from his act. What would be more quickly apprehended by one setting fire to dry leaves and brush, than that it would run before the wind and consume property in its pathway? There is no error in the answer to defendants' fourth point; besides, in the general charge on this matter, the court called attention to the testimony in a manner which ought to be entirely satisfactory. An ex-

amination of the testimony has convinced us that the defendants' tenth and eleventh points were rightly refused. The plaintiff's, if believed, standing alone, would justify a verdict in his favor, and consequently the court was bound to submit the question of fact to the jury, no matter how strong the defendants' counter proofs. It would be idle to refer to the testimony of each witness in detail. The fourth, sixth and tenth assignments, were not pressed, for the declared reason that it is now settled that it is not contributory negligence in the owner to leave combustible material on his land near a railway track. Philadelphia, etc., R. Co. v. Hendrickson, 28 Penn. St. 182.

The numerous points were fairly answered and the instructions so full that there is no complaint of omission to charge on any question which was raised at the trial.

Judgment affirmed.

FIRE INSURANCE — PROOF OF LOSS — WAIVER OF CONDITIONS.

WILLIAMS v. NIAGARA INS. CO.

Supreme Court of Iowa, June Term, 1879.

1. INSURANCE—PROOF OF LOSS—CONSTRUCTION.—A provision in a policy of insurance that in case of loss the proof of loss "must be made before the nearest magistrate or notary public," should receive a liberal construction. Its object is simply to prevent the assured from selecting the magistrate. A short distance is not material.

2. AGENT—PAROL AGREEMENT—WAIVER OF CONDITIONS.—The policy stipulated that the consent of the company should be necessary to allow the premises to become or remain occupied. At the time of making the application, the agent agreed with the assured that the building might remain unoccupied for thirty days. *Held*, that this was binding on the company.

3. CUSTOM—ADJUSTMENT OF LOSS.—The custom of adjusting losses can not affect the rights of the assured, unless he had knowledge of the custom at the time of the issuing of the policy. Testimony of experts as to this custom is therefore inadmissible.

4. TIME FOR FILING REPLY.—Notwithstanding the provisions of the code (§ 2636) requiring a reply to be filed before noon of the day succeeding that on which the answer was filed, the court has power to allow it to be done at a later day.

5. CONTINUANCE — DISCRETION OF COURT.—The granting of a continuance is within the discretion of the trial court, which will not be reviewed unless abused. The filing and consideration of affidavits in resistance thereto does not constitute error.

Appeal from the Lee District Court.

Action on a policy of insurance against loss or damage by fire. Policy was dated November 18th, 1876, and insured the property one year. The loss occured on the 4th or 5th of the month of November, 1877. Trial by jury. Judgment for plaintiff. Defendant appeals.

McCrary, Hagerman & McCrary, for appellants; *Gilmore & Anderson*, and *Craig & Collier*, for appellee.

SEEVERS, J., delivered the opinion of the court:

The petition was filed in January, 1877, and the defendant required to plead thereto April 3d, 1877. The answer was in fact filed on April 5th. The replication was not filed until December 13th, 1877. On the same day a motion was filed to strike out the reply, because: 1. It was not filed within the time required by law; 2. Because of the delay between the filing of the answer and reply; 3. Because it was filed without leave of the court. This motion was overruled, and the ruling assigned as error.

Strictly the reply should have been filed before noon of the day succeeding that on which the answer was filed. Code, sec. 2636. The statute, however, fails to provide any penalty for the failure to file the reply at that time, other than that material allegations of the answer shall be deemed true. Code, sec. 2712. Until a reply was filed the defendant had the right to act on the supposition, the answer was to be taken as true. Without doubt, the defendant could have invoked the action of the court, and had the issue settled at a much earlier day, if it had been deemed advisable to have the same done. But no such action was taken, and, if not a matter of right, it was clearly within the discretion of the court to permit the reply to be filed at the time it was. When the court overruled the motion, it in effect granted leave to file. There was no necessity of going through the form of striking the reply because not filed in time, and then granting such leave, or, to say the least, it was within the discretion of the court to do so or not. To prevent any possible misapprehension we incline to think the plaintiff had the absolute right to file the reply upon such reasonable terms as the court might see fit, and could properly, under the circumstances, impose.

Because of the reply being filed during the term, and the alleged fact that the defendant had prepared for trial on the issue presented by the petition and answer, and was not prepared to try the issue presented by the reply, a continuance was asked. It does not appear that the application was sworn to. The granting of a continuance for the reason above stated, is clearly within the discretion of the court. Before we can interfere, it must appear such discretion has been abused, and that substantial justice will be more nearly obtained by our so doing. Code sec. 2749. There is nothing showing any such abuse. There is no showing other than a simple statement to the effect that the defendant was not fully prepared to try the issue presented by the reply.

Counsel do not insist that there was any abuse of discretion, or that the defendant was prejudiced by the overruling of the motion, but urge that the plaintiff was permitted to file and read affidavits in resistance of the motion, and that this constitutes prejudicial error. Whether the right exists to file affidavits in resistance of a motion for a continuance which is within the discretion of the court, we do not determine. What we do hold is, that, if the motion was insufficient, and the dis-

cretion of the court not abused, the filing and consideration of affidavits in resistance thereto, does not constitute prejudicial error.

Afterwards there was filed an amended motion for a continuance, based on the absence of the president and secretary of the company, and it was shown by affidavit that they were not present, nor had their depositions been taken, because their evidence was unnecessary as the issue stood previous to the filing of the reply. The fact expected to be proved by said witness, was that the only authority of Collins, the agent with whom insurance had been affected, "was to receive proposals for insurance; to fix the rate of premium; to receive moneys for the same, and to countersign, issue, renew and consent to the transfer of policies of insurance in accordance with the rules and instructions of said company; that said authority is in writing in the form of a commission to said Collins as agent." Upon the presentation of the motion to the court the plaintiff's counsel stated that no objection would be made to the introduction as evidence of said commission and instructions, whereupon the motion was overruled. In this ruling there was no error. It was not claimed that the commission and instructions were not at hand, and, in fact, they were introduced on the trial.

The other matters stated in the motion were immaterial under the issue and trial of the case, as we understand it to be.

It is said that the proofs of loss were insufficient in two particulars: 1. That they were made before a notary public; and, 2, that they were not accompanied with the certificate under seal of the nearest magistrate, or notary public, as required by the terms of the policy. The proofs were in due time forwarded to the company or its authorized agents, and the only objection made thereto was the "absence of the whole value of the property at the time of the fire." This objection is not now insisted on but that the "proofs were not under seal," is the objection relied on. Having made a specific objection, which has been raised, all others must be deemed to have been waived. Ayres v. Hartford Ins. Co., 17 Iowa, 176; Young v. Hartford Ins. Co., 45 Iowa, 377. The provision in the policy that the certificate therein required must be given by the nearest magistrate or notary public, was without serious doubt inserted for the purpose of preventing the insured from selecting the officer to perform such duty. While this is so, the provision must have a reasonable, instead of a literal, construction. It does not, we think, require the distance should be determined by the extension of a straight line, or that a surveyor should be called in and an exact measurement taken; nor is it required that the assured should cross lots. In the absence of bad faith on the part of the assured in selecting the officer, nice distinctions as to the distance should not be indulged. A few feet more or less can not be material. Under this view the evidence fails to satisfy us the officer selected was not the nearest, as required by the terms of the policy, and the jury have found that he was.

The plaintiff, when on the stand as a witness, gave her version of a conversation between herself and Collins and Zollars, another agent of the company. When Collins was on the stand as a witness, he was asked to state that conversation, and counsel stated that his object was to contradict or impeach the plaintiff. An objection to the proposed evidence was sustained, and the defendant excepted. Whereupon counsel for the defendant stated they proposed to prove by the witness that he said to the plaintiff, in said conversation, that "Roberts had procured the policy to be delivered * * * under the statement that the house was then occupied, and that plaintiff replied: Mr. Roberts never stated that, and he will so swear: shaking her fist in witness' face and saying: You lie! you lie! you lie!" The plaintiff, when testifying, denied using such language. Whether she did or not, had no tendency to prove any issue in the case, and was therefore immaterial. Being so, the proposed impeaching evidence was also immaterial. Besides this, Collins testified that Roberts did tell him the house was occupied, and Zollars testified to what the plaintiff did say in said conversation. Clearly, therefore, there was no prejudicial error in the ruling.

The plaintiff, against the objection of the defendant, was permitted to prove the location of the house. The house was only partially consumed, and the appellee claims the evidence was admissible under a clause in the policy, which limited the extent of the liability in case the value of the property had depreciated from use or otherwise. How this is we are unable to determine, as only a portion of the policy is before us, and no such provision is found in such portion. But we must, in the absence of any showing to the contrary, presume there was some provision of the policy that would justify the admission of the evidence. It is difficult to conceive how the evidence could have had the important bearing claimed by the appellant, or how it could have had a prejudicial effect on the jury.

There was a demurrer to the reply, which was overruled, and such ruling is assigned as error. Whether this error was waived or not we do not determine, it not being material to do so, as the same question is presented in the instructions to the jury. Among which are the following asked by the plaintiff, and given as modified by the court: "If you believe from the evidence that, on October 18th, 1876, the date of the policy, the plaintiff stated to the agent of the defendant, that the house in question was unoccupied, and that the said agent of said company signed the policy, and accepted the premium therefor, well knowing the said house was unoccupied, then defendant can not avoid said policy by showing that said house was unoccupied at the date of said insurance." By the court: "Without further showing that it was in fact to be occupied before the time it was destroyed by fire." "If the agent of the defendant, at Keokuk, was authorized by defendant to countersign and issue policies, to accept risks offered him, and receive premiums therefor, and he insured said house, knowing the same was unoccupied, then said insurance company will be bound by his act."

The evidence on the part of the plaintiff tended to prove that it was understood and agreed between the plaintiff and Collins, at the time the policy was written up and the premium paid, that the house was unoccupied, and that it might remain so for the period of thirty days; and the defendant's evidence tends to prove that the house was to be occupied by the first day of November. The policy provides, "Or if the premises are, at the time of issuing, or during the life of the policy, vacant, unoccupied and not in use, whether by the removal of the owner or occupant, or for any cause, without this company's consent is indorsed hereon, this insurance shall be void and of no effect. * * * The use of general terms or anything less than a distinct specific agreement, clearly expressed, and indorsed on this policy, shall not be construed as a waiver of any printed restriction therein, nor in the event that this policy shall become void by reason of any of the conditions thereof, shall the agent have power to revive the same, except by issuing a new policy; and any policy so made void shall remain void and of no effect, until removed by the actual issue and delivery to the assured of the new policy, any contract by parol or understanding with the agent to the contrary notwithstanding." * * * The fire occured on the 4th or 5th of November, which was within thirty days of the date of the policy, which it is said never existed as a legal and binding contract, because of the parol agreement made at the time it was written up, as to the occupation of the building. The argument being in brief that a contract must be wholly written or wholly in parol—that it can not be a verbal contract when partly written and partly in parol. This case, therefore, it is said, is distinguishable from Viele v. Germania Ins. Co., 26 Iowa, 9, as in that case the contract at one time was valid and binding. The distinction we do not think well taken. But if so, such can hardly be said of the subsequent case of Young v. Hartford Ins. Co., before cited. It must be regarded as settled law in the State, that notice to an an agent having the powers referred to in the second instruction is notice to the company. Bartholomew v. Merchants' Ins. Co., 25 Iowa, 507; Altman v. Phœnix Ins. Co., 27 Id. 203; Miller v. Mutual Ins. Co., 31 Id. 216. We have, then, this case; the company, with full knowledge that the house was unoccupied, and would be for a time, issues the policy and receives the premium, and then, after a loss occurs, insists it is not bound, and the policy never had a legal existence because said house was vacant. Having issued the policy, taken the premium, and thereby induced the plaintiff to believe she was insured, the defendant is estopped from alleging and proving the policy never had a legal existence. By issuing the policy the defendant waives the conditions as to the occupation of the building, and also that such waiver should be expressed on the policy in writing. In addition to the cases heretofore cited, see Boecher v. Hawkeye Ins. Co., 47 Iowa, 256. What has been said applies with full force to the error assigned as to the sixth instruction.

The policy was not delivered at the time it was written up, and the evidence tended to show that the plaintiff directed one Roberts to go to Collins and get it for her, and that Roberts, at the time he got the policy, represented the house was occupied. The court instructed the jury that if "Roberts went to defendants' agent to get the policy which had already been contracted for and paid for by the plaintiff, and if he was only her messenger, authorized to get and bring to her said policy, then his acts and declarations as to any other matter can not affect plaintiff's right to recover unless the defendant shows by the evidence that Roberts had authority or direction from plaintiff to act for her, and represent her in the matters relied on by defendant to bind her."

The objection to this instruction is that it, in effect, takes from the jury the evidence given by defendant, tending to show what Roberts said when he got the policy. We do not so understand it. All that it requires is that the authority of Roberts to bind the plaintiff by his acts and declarations should be in some manner made to appear to the satisfaction of the jury. The authority of the supposed agent can not be proved by his declaration; something more than this is required.

It is conceded that the fifth instruction. as to the weight to be given to verbal admissions, is in the exact language used in 1 Greenl. Ev., sec. 200, but it is insisted that in this case, owing to peculiar circumstances, such an instruction is not applicable. We have carefully weighed all that has been said by counsel, and confess our inability to see wherein the instruction, as modified by the court, is not as fully applicable in this as any other case. We regard it as entirely unobjectionable.

The seventh instruction is objected to because it "erroneously puts on the defendant the burden of proof as to how long the house was to remain unoccupied." We do not consent to this proposition. The only contest in relation to the occupation of the house was whether it was to be occupied by the first day of November, or whether thirty days from the date of the policy. The validity of the policy being determined, the burden was on the defendant to prove that it was to have been occupied by the first day of November. If wrong in this, the fourth instruction, given at the instance of the defendant, fairly and properly, when made in connection with the seventh instruction, placed the true question for determination before the jury. When the question of the validity of the policy is separated from the question as to when the house was to be occupied, it will readily be seen that the burden was on the defendant to, by proof, shorten the life of the policy.

It is said that there was no evidence on which the eighth instruction could be based; that the ninth is "*verbose*," and the tenth, eleventh and twelfth "single out evidence and give prominence to immaterial facts." It is deemed unnecessary to set out these, or to give at length the reasons on which our conclusions are based. We have carefully considered each objection, and examined the abstract and argument of counsel, and feel constrained to say that none of the objections are well taken. The instructions asked by defend-

ant, and given in a modified form, are, as they went to the jury, consistent with the other instructions which we have approved. It follows, therefore, that there was no error in modifying them, as was done. The twelfth instruction asked by the defendant was properly refused, because it was in direct conflict with the other instructions given.

The court refused to permit the defendant to prove by experts the manner of adjustment of losses by insurance companies. This was clearly incompetent evidence. The rights of the plaintiff were perfect or otherwise, under the policy, when the loss occurred. A custom as to the manner of adjusting such loss could not affect her, unless she had knowledge thereof at the time the policy was executed, or at least that such custom was so general and well understood that it must have entered into and formed a part of the contract. It is lastly urged that the court erred in overruling the motion for a new trial; and, as we understand the point made, it is that the evidence is not sufficient to warrant the verdict. Under the settled principles of this court, we can not interfere with the verdict on this ground. Affirmed.

NOTE.—In regard to the question of the proofs of loss in the foregoing opinion of the learned judge, it certainly appears that he has given great latitude to one of the cases cited in support thereof, viz.: Ayers v. Hartford Ins. Co., 17 Iowa, 176. The difference between that case and the present one is this. In this case the question was whether the proofs of loss were made according to the terms of the policy, requiring them to be made before the nearest magistrate. If they were not made before the nearest magistrate they were inadmissible as proof. In Ayres v. Hartford Ins. Co., *supra*, there was no dispute as to the validity of the proofs themselves; but that they were made by only one party in interest, he making them for himself and the plaintiff Ayres. In that case, the court held that if the co-owner was not an agent for the plaintiff, the proofs so made were not sufficient. Mason v. Harvey, 8 W. H. & G. 819; Keenan v. Dubuque Mutual Ins. Co., 13 Iowa, 375. However, the ruling of the court regarding the construction of the clause in the policy in regard to proofs of loss is sustained by the weight of authority. Francis v. Ocean Ins. Co., 6 Cow. 404; Catlett v. Pacific Ins. Co., 1 Wend. 561; Ocean Ins. Co. v. Francis, 2 Wend. 64; Bumstead v. Dividend Mut. Ins. Co., 12 N. Y. 81; MacMasters v. Westchester Mutual Ins. Co., 25 Wend. 37; Thuring v. Great Western Ins. Co., 111 Mass. 93; Imperial Fire Ins. Co. v. Murray, 73 Penn. St. 13; Globe Ins. Co. v. Boyle, 21 Ohio St. 119, and cases there cited.

The question discussed by the learned judge regarding the occupancy of the building and the power of the agent to bind his principal is not altogether clear or free from doubt. The decisions thereon are yet conflicting; but the better opinion seems to be that every statement of an agent to the insured, having the power to issue policies, receive premiums, give consent to increase of risks, and waive forfeitures, which waives any printed conditions of the policy, is binding on the company. And the insured is not bound to take notice of the powers and duties of the agent. If he has knowledge of any limitations on his powers, such as heretofore enumerated, he is bound thereby. But he is not bound as in matters of which he is chargeable with having knowledge, such as matters of common observation. Young v. Hartford Ins. Co., 45 Iowa, 376; Bartholomew v. Merchants Ins. Co., 25 Iowa, 507: Aultman v. Phœnix Ins. Co., 27 Iowa, 203; Mississippi Ins. Co. v. Neyland, 9 Bush. 430; Sheldon v. Conn. Mutual Ins. Co., 25 Conn. 207; Viele v. Germania Ins. Co., 26 Iowa, 9; Westchester Fire Ins. Co. v. Earle, 33 Mich. 143; Bowman v. Agricultural Ins. Co., 59 N. Y. 521; Brohun v. Williamsburg Ins. Co., 35 N. Y. 131, and cases there cited. In Hartford Fire Ins. Co. v. Walsh, 54 Ill. 664, the policy stipulated that "if the premises shall be vacated by removal of the occupant for a period of more than thirty days without notice and consent indorsed upon the policy, it shall be void." While it was in force consent was obtained to let them remain vacant. The party to whom notice was given ceased to be an agent for the insurer. The policy was renewed, and afterwards one of the houses became vacant for more than thirty days. It was held that the policy was avoided. In American Ins. Co., v. Padfield, 8 Ch. L. N. 138, it was held that the consent of an agent before the issuance of the policy, and at the time of the application for insurance, to the non-occupancy of the premises, could not bind the company. The other cases holding the same doctrine and involving substantially the same state of facts, are Wustum v. City Fire Ins. Co., 15 Wis. 138; Ashworth v. Builders Mutual Ins. Co., 112 Mass. 422; Ætna Ins. Co. v. Burns 5 Ins. L. J. 69; Keith v. Quincy Mutual Ins. Co., 9 Allen, 231. But in some of these cases the principle question involved was what constituted an occupancy, Although cited as holding a contrary doctrine to that enunciated in the case under consideration, the fact is the question is not fully raised in any one of them, and mostly the opinions in regard to the question under consideration are extra-judicial.

But opposed to this are the cases of Hough v. City Fire Ins. Co., 29 Conn. 10; Cannell v. Phœnix Ins. Co., 59 Me. 582; Foy v. Ætna Ins. Co., 3 Allen (N. B.), 29; Young v. Hartford Fire Ins. Co., *supra*; Peoria Fire & Marine Ins. Co. v. Hall, 12 Mich. 213; Warner v. Peoria Fire & Marine Ins. Co., 14 Wis. 319; Rowley v. Empire Ins. Co., 36 N. Y. 550; Keenan v. Missouri State Mutual Ins. Co., 12 Iowa, 131, and cases there cited. In all these cases, the question was raised and discussed, and the same conclusion was reached as in the case at bar. C. M. D.

MUNICIPAL CORPORATIONS — LEGISLATIVE POWER — POWER TO CONTRACT— ULTRA VIRES.

CITY OF INDIANAPOLIS v. INDIANAPOLIS GAS LIGHT AND COKE CO.

Supreme Court of Indiana, June, 1879.

1. A MUNICIPALITY CAN NOT ABRIDGE ITS LEGISLATIVE POWER by contract, and it can not impair a contract by its legislative power; neither can it make a valid contract beyond its power to contract, and a contract made within its power to contract is valid.

2. A CONTRACT MADE BY A MUNICIPAL CORPORATION, not *ultra vires*, not against public policy, and not fraudulent, may be enforced the same as the contract of a person.

BIDDLE, J., delivered the opinion of the court:

The complaint in this cause alleges, in substance, that, on the 22d day of July, 1876, the city of Indianapolis and the plaintiff entered into a contract in due form of law, whereby the latter agreed to furnish gas of a quality and kind specified in the

3d section of an ordinance of the city, enacted March 19, 1866, for the supply of all the street lamps, city offices, engine houses, council chamber, tunnels, bridges, station houses, and all other places where gas was required for the use of the city in her corporate capacity, in consideration of an agreed compensation; that the contract was to be in full force and operation for the term of five years from its date, and a further term of five years, if the city so elected; that, among other provisions, it contained the following: "It is further stipulated and agreed, that nothing in this contract shall alter, modify or suspend the provisions of the contract at this time existing between the said party of the first part (the company), and the said city of Indianapolis, as evidenced by the ordinance (of March 19, 1866, and which was for a term of tw nty years), except so far as may be necessary to give effect to the provisions of this contract, and when this contract shall terminate, either by the expiration of the time limited, or by the failure or refusal of the city to perform its part thereof, then the said contract of March 19, 1866, shall stand and continue for the unexpired term thereof, to be the contract between the parties hereto * * * in all respects as though this contract had never been made."

It was also stipulated between the parties that, if the Gas Company failed to keep the street lamps and posts clean and in repair, the city should cause them to be cleaned and repaired, and deduct the cost from any sum of money due to the gas company from the city; and, also, that the city should have the right to deduct from any amount due to the company, fifteen cents for each lamp for each night that it was not lighted, and kept lighted during the time required by the time-table. Also that the city should, at all times, have the right to test the quality of the gas furnished by the company, and the capacity of the burners on the street lamps.

It is further alleged that, on the faith of this contract, and for the purpose of being better able to carry it out, the plaintiff had, in good faith, from time to time, made extensive additions to its apparatus, extended its mains, etc., into newly-added streets, on many of which there were few, if any, private consumers, made large repairs to lamps, etc., and was, by reason of the contract, enabled to furnish gas to private consumers at a rate much less than would be practicable without it; that the plaintiff had fully complied with the contract, and was prepared to, in all things, discharge its obligations; and that the city had so done, until the —— day of ——, 1878, when it notified the plaintiff, through its clerk, "that unless it accepted $55,000 for 2,000 hours, and the company to light and extinguish the lamps so as to give the most light, that the city would discontinue the use of gas on August 1, 1878, and that payment of said gas should begin July 1, 1878, and end June 30, 1879, under the direction of a schedule to be furnished by the city civil engineer," and which notice was based on a resolution to that effect, of the Board of Aldermen and Common Council, adopted July 22, 1878; that, on its reception, the plaintiff returned answer to the defendant, refusing to recognize the action referred to, and setting out at length the reasons therefor, and also declaring its intention to continue lighting the streets, etc., as provided for by the contract, until the city should refuse to pay as therein provided; that on the ensuing 31st day of July the council and board resolved that, inasmuch as the legislature, by the act of 1877, had limited the levy, for revenue purposes of the city, to ninety cents on the one hundred dollars, and the decline in valuations had greatly reduced the amount of taxables on the city duplicate, thereby reducing the revenue for the then fiscal year, and it was impossible to carry on the city government, and light the streets, etc., as during the preceding year, and no arrangement could be made with the company for lighting which would be within the city's revenue, it was deemed that the best interests of the city required the discontinuance of the lighting with gas from August 1, 1878, and the same was accordingly ordered, and the engineer was directed to notify the company that the city would pay for no gas consumed, etc., after that day. He was also ordered to remove the burners and seal the lamps, and it was ordered that inquiry should be made respecting the cost of lighting by other means than gas. It is averred that a copy of the resolution was served on the company, but notwithstanding, it continued to furnish gas and perform its agreements until the nineteenth day of August following, when the parties entered into a provisional agreement, which was set out in full in the complaint. After reciting the execution of the contract of July 22, 1876, that disputes had arisen respecting its validity, and that suit involving this question had been instituted by the company, it was provisionally agreed for the term of one year from August 2, 1878, that the company should proceed to furnish gas, etc., according to the terms specified, and that after the expiration of the contract the parties were to be remitted to whatever rights they had under the contract of July, 1876, and that the provisional agreement was not to be construed as against the positions occupied by the parties respecting its validity, etc., nor as barring any right of action the company may have had for gas furnished, etc., on *the first day of August*, 1878. The contract concludes as follows:

"And, for the purpose of determining the right of said company to recover for said gas, and lighting and extinguishing the same, the following facts are agreed, to wit: That said city, on the twenty-ninth day of July, 1878, notified said gas company that she did not regard herself bound by said contract of July 22, 1876, and elected to, and did treat said contract as a nullity; and that the city would not pay said company for gas furnished, and for lighting, extinguishing, cleaning and repairing of lamps, under the terms of said contract, on and after the first day of August, 1878; and that she (the said city), claimed the right to regulate the lighting of the streets and alleys of said city, and of determining what amount of gas should be consumed by the city; and that the city, by her Common Council and Board of Aldermen, had resolved

and determined, on and after said first day of August, 1878, not to light the streets and alleys of the city as, and in the manner provided for in said contract, and resolved and determined upon other regulations for lighting the streets and alleys of said city. And after said notice by the city, the said gas company, notwithstanding the objection of the city, proceeded to, and did light all the lamps mentioned in said contract of July 22, 1876 (2840 in number), in all things according to the terms of said contract of July 22, 1876, on said first day of August, 1878. And it is agreed that the gas furnished, and the lighting and extinguishing the said lamps, on said first day of August, was, and is of the value of $230, according to the terms of the contract of July 22, 1876. Now if, upon the facts aforesaid, the contract of July 22, 1876, was a binding and operative obligation upon the city on said first day of August, 1878, the said gas company shall have judgment for $230; otherwise, the city shall recover her costs."

The complaint, in conclusion, alleges that the gas furnished, etc., on the first day of August, was, as measured by the prices and terms of the contract of July 22, 1876, of the value of $230, and judgment therefor was prayed.

To this complaint the defendant interposed a demurrer, assigning, for reason, that it did not state facts sufficient to constitute a cause of action.

The demurrer was overruled. The defendant excepted, and refused to plead further; whereupon the court rendered judgment for the plaintiff. The only question in the case, therefore, is thus presented upon demurrer to the complaint.

The following is the statutory authority upon which the contract is based:

The plaintiff was incorporated on the 12th day of February, 1851. Local Acts of 1851, page 295. The legislature reserved no right, either to repeal or amend the charter. The first section of the charter creates certain persons named and their associates, a body corporate and politic, "with perpetual succession." This created a corporation without any limit as to its duration, unless there is some other provision in the charter clearly indicating that it was not the legislative intention to confer upon the company a perpetual existence. The second section of the charter indicates the purpose for which the corporation was created, to wit: "to manufacture and sell gas, to be made from any or all the substances, or a combination thereof, from which inflammable gas is obtained, and used for the purpose of lighting the city of Indianapolis or streets thereof, and any buildings, manufactories, public places, or houses therein contained, and to erect necessary works and apparatus for conducting gas in the streets or avenues of said city." The fifth section, after providing that the corporation may make by-laws, etc., not inconsistent with the Constitution and laws of the United States, or of the State of Indiana, provides, "said company shall have the privlege of supplying the city of Indianapolis and its inhabitants with gas, for the purpose of affording light for the term of twenty years." The section then makes provision as to the duties of agents, etc., of the corporation, and their control, and concludes with the following proviso: "That nothing in this act shall be so construed as to grant to said Gas-Light and Coke Company the exclusive privilege of furnishing said city with gas for the purposes within named."

The sixth section is as follows: "The said city of Indianapolis, in its corporate capacity, shall have power to contract with said company to furnish gas for the purpose of lighting the streets, engine houses, market houses, or any public places or buildings, and may provide means to pay for the same in such a manner as they may deem best," etc., etc.

In the general law relating to cities, under which the city of Indianapolis is now incorporated, the fifty-third section, in enumerating the powers of cities, has the following: "Twenty-eighth—To construct and establish gas-works, or to regulate the establishment thereof by individuals or companies, or to regulate the lighting of streets, public grounds and buildings, and to provide, by ordinance, what part, if any, of the expense of lighting any street or alley shall be paid by the owners of lots fronting thereon, and in what manner the same shall be assessed and collected, and to make the same a lien upon real estate." 1 R. S. 291.

The city of Indianapolis, at the time the appellee was incorporated, was acting under its original charter, granted in 1838. The question was mooted rather than discussed, whether the city, by abandoning the original charter, and accepting its franchises under the general act for the incorporation of cities, did not forfeit its rights to contract with the gas company, as expressly conferred by the sixth section of the act incorporating the company. We do not examine this question particularly, as we are of the opinion that the city had ample authority under the 28th clause of section 53 of the general act, as above quoted, to contract with the company concerning the subject matter in controversy; and, having the power, might exercise it according to its own discretion, within the limits of its franchise. There is not any doubt but the company had the power to contract with the city. We may thus safely conclude that the parties had the power to contract concerning the subject matter.

But the appellant claims that "to regulate the lighting of the streets is a legislative power which can not be delegated away, surrendered or restricted by contracts or otherwise; and that the contract in question is a restriction upon that legislative power, and therefore invalid." This we understand to be the basis of the appellant's defense to the contract.

As to the power to contract: All persons may contract unless the power is denied by law; as in case of minority, coverture, or other legal disability. No corporation can contract unless the power is granted by law. This power is generally granted to business corporations, as for banking, manufacturing, shipping; and such corporations generally have no legislative or governmental powers, except the power to make by-laws for their own government; they can not pass

ordinances for the government of others. Municipal corporations, besides the power to contract, which is generally granted to them within certain limits, have legislative or governmental powers, by which they make by-laws to govern themselves, and pass ordinances to govern others, as the citizens of a town or city within their geographical limits. This power to legislate, within the authority delegated to them by law, is distinct from the power to contract, although exercised by the same corporation. They can not, by contract, delegate or restrict their legislative power, nor can they merely, by their legislative power, make a contract. These two powers need not be confounded. The exercise of the legislative power requires the consent of no person except those who legislate, while it is impossible to make a contract without the consent of another, or others. We think, therefore, that when the city of Indianapolis made the contract in question, with the gas light company, it made it in the exercise of its power to contract, and not in the exercise of its power to legislate, although the power to make the contract was authorized by an ordinance; and having the power to make a contract touching the subject-matter, it had the right to make it according to its own discretion, as to its prudence or good policy, within the limits of its franchise. Nor can we see that the contract in the least restricts the legislative power of the city, except that, as the sanctity of the contract is shielded by the Constitution of the United States, it can not, in the exercise of its legislative power, impair its validity; for it would be a solecism to hold that a municipal corporation, by an ordinance or resolution, can impair the validity of a contract, when the State, which created the corporation by its most solemn acts, has no such power.

The counsel upon both sides, who discussed the question before us, seemed to think that the authorities upon the question were seriously in conflict. This court had occasion to remark, in the case of Roll. v. City of Indianapolis, 52 Ind. 547, as follows: "The question presented in this case is one of intrinsic difficulty. The authorities may possibly be reconciled, but they are not entirely harmonious. No doubt the discrepancies sometimes arise out of the differences in the powers granted by municipal charters, which are not always distinguished in the decision, thus leaving us in danger of being misled by propositions which seem general, when they are applicable only to a given municipality." So, we may well say in the present case, we do not think the authorities, upon the principles of construing the powers of municipal corporations, are in serious conflict. If all the charters were the same, we think the authorities would essentially harmonize. It is necessary, therefore, in examining the authorities, to be particular in ascertaining the premises in each case; where they are the same the authorities will generally agree. They all agree in the following propositions, we believe: That a municipality can not abridge its legislative power by contract, and that it can not impair a contract by its legislative power; that a municipality can not make a valid contract beyond its power to contract; and that a contract made within its power to contract is valid; so that, when the powers granted are different, the conclusions must be different also. But the case of Rittenhouse v. The Mayor, etc., 25 Md. 336, which seems to hold that the repeal of an ordinance authorizing a contract, abrogates the contract, it must be admitted can not be reconciled with the current of authorities. We have found no other case that does not hold upon that point directly the reverse; we therefore can not follow that case.

The case of Garrison v. City of Chicago, 7 Biss. 480, relied upon by appellant's counsel, does not seem to us to support their views. That case was upon a contract made by the gas company with the city of Chicago, to furnish the city with gas for ten years. At the time the contract was made, or, rather, at the time when a previous contract was extended, the charter contained a provision that no contract should be made by the city involving any expense, unless due appropriation was previously made to meet it; and the comptroller was required in May of each year, to submit an estimate of the amount necessary to defray the expenses of the city for the current fiscal year. No such appropriation was previously made, and the court puts the case expressly on that ground, in the following words: "The question to be determined is whether there was a reasonable necessity, on the part of the city council, to extend the contract in controversy here, and which will not be maintained for ten years from its date, there being no appropriation made commensurate with the obligation of the contract." Here is a contract not only without authority in the charter to make it, but made in violation of its express terms, which both parties were bound to know at the time they contracted. Of course such a contract is invalid. The extension of the contract already made, ten years beyond its terms, is not different in principle from making a new one.

In the case of City of Oakland v. Carpentier, 13 Cal. 540, wherein the trustees pretended to convey to Carpentier and his representatives, the exclusive right and privilege of constructing wharves, piers and docks, at any point within the coporate limits of the town of Oakland, with the right of collecting such wharfage and dockage as he might deem reasonable, upon certain conditions expressed in the ordinance." This contract was held to be invalid, because it parted with the public authority over the wharves and docks, and left them to be controlled by private interest, and not because the city of Oakland had no power to contract for building wharves and docks. By the contract we are considering, the city of Indianapolis is not restricted in any respect from the legitimate exercise of its public power touching the subject-matter of the contract; but expressly reserves its administrative authority to keep the posts, lamps, and burners in good order and repair, if the gas company should fail to do so; and also reserves the right to test the quality of the gas furnished by the company, and the capacity of the burners at all times. We can not see wherein, by the contract, the city is restricted from extending its streets, es-

tablishing an additional number of lamps, obtaining gas from other sources, or establishing its own gas works, as the public interests might require; and all this it can do without violating its contract. No exclusive right is granted to the gas company. Nor can we recognize the fact averred in the complaint, that the legislature has reduced the ratio of taxation, and thus embarrassed the city in its finances, as rendering the contract invalid, or in any manner excusing the city from the performance of its stipulations.

A municipal corporation not having either body, limbs, feet or hands, but being merely a legal entity, can not execute its own acts, nor administer its own affairs. To do this it must employ persons, other corporations, or agencies of some kind, and to employ them and agree to pay them is to make a contract; and if it could not make such contract and was not bound thereby, it could not carry on the purposes or attain the objects for which it was established. Its ordinances will not execute themselves, and to deny it the power to have them executed would be to render it useless and helpless. When it makes a contract within the scope of its power—not *ultra vires*—which is not against public policy and not fraudulent, it must be enforced the same as the contract of a business corporation, or a person. Upon what is averred in the complaint, it is impossible for a court to say that the contract before us is open to any of these objections. The authorities upon the question are too numerous to be noticed in detail; but we think their main current supports the views we have taken in this opinion. Nor do we think that, upon principle, they are seriously conflicting. The apparent conflict arises from applying their language generally, when it was only meant to apply to some particular municipality. Dillon Mun. Corp., §§ 52, 55, 60, 61, 97, 245, 250, 371, 372, 382, 394, 395, 547, 548; 15 Ind. 395; 39 Ind. 373; 42 Ind. 200; 52 Ind. 547; 9 Cal. 453; 16 Maine, 317; 7 Hill, 61; 27 N. Y. 611; 59 N. Y. 228; 28 Ga. 50; 31 Ala. 542; 2 Dill. 70; 18 Ohio, 563; 23 How. 435; 8 Wall. 64; 6 Otto, 341; 28 Mich. 228; 39 Minn. 671; 13 Iowa, 229; 29 Wis. 454; 25 Conn. 19; 31 Penn. St. 175; 64 Penn. St. 169, and numerous other authorities.

Judgment affirmed.

SOME RECENT FOREIGN DECISIONS.

PRINCIPAL AND SURETY—GIVING TIME TO PRINCIPAL—DISCHARGE OF SURETY.—The testator, who was surety in a covenant for the payment by the defendant, Scott, of a sum of money, died, leaving a will by which he appointed Scott and the other two defendants executors. After his death, Scott, on his own behalf, made various payments on account of the debt, and being unable to pay the balance, some $1,152, when due, he got the plaintiff to take his promissory note therefor payable in three months, Scott having arranged with his bankers to discount this note on which plaintiff got the money. When the note matured part of the amount was paid by Scott and the balance renewed by another note of Scott's indorsed by the plaintiff as before, the last renewal being for $618, which amount the plaintiff sought to recover in his action against the defendant as executor in the deed of suretyship. In the dealings between plaintiff and Scott as to the promissory note and various renewals, no reference was made to the estate of the surety nor to the deed—and the co-executors of Scott had no knowledge or notice of such dealings: *Held*, affirming the judgment of the Common Pleas, that the dealing between plaintiff and Scott had the effect of releasing the liability of the estate of the surety—notwithstanding that Scott was at the time of such dealing one of the executors of the surety.—*Austin v. Gibson.* Ontario (Canada) Court of Appeal, 15 Can. L. J. 189.

CRIMINAL LAW — ABORTION — SUPPLYING "NOXIOUS THING."—The prisoner supplied a pregnant woman with two bottles of Sir James Clarke's female pills, with instructions to take twenty-five pills at a dose, and it would procure a miscarriage, but if taken as directed in the wrapper on the bottles—namely, one pill night and morning, and increasing the dose to four pills a day, it would have a contrary effect. It was proved that the pills contained oil of savin, and that a bottleful, consisting of from three to four dozen pills, would contain about four grains, which would probably be sufficient to procure an abortion; that oil of savin in any dose was a most dangerous thing to give to a pregnant woman, and was given in such cases to procure abortion. *Held*, that there was a supplying of a noxious thing, within the meaning of the act, 33, 34 Vict. ch. 20, sec. 60, D, to procure an abortion.—*Reg. v. Stett.* Ontario (Canada) Court of Common Pleas, 15 Can. L. J. 193.

MASTER AND SERVANT — ENTICING SERVANT TO DESERT EMPLOYMENT— MEASURE OF DAMAGES. — 1. Plaintiff sued defendants for enticing and procuring certain servants of plaintiff to desert his service. The evidence at the trial established that the parties in question were in plaintiff's service, and with the exception of one of them that they were induced by defendants' manager to leave the same. *Held*, following Lumley v. Gye, 2 E. & B. 216, that plaintiff was entitled to recover, and that the measure of damages was not confined to the loss of services, but that they were justified in giving ample compensation for all damages resulting from the wrongful act. 2. Plaintiff while objecting to one of the parties going, said he did not know that he would trouble him if he did leave, but he did not consent to his so doing. *Held*, that this did not in law amount to a permission to leave his service.—*Hewett v. Ontario Copper, etc. Co.* Ontario (Canada) Court of Queen's Bench, 15 Can. L. J. 205.

HUSBAND AND WIFE—AUTHORITY OF WIFE WHEN HUSBAND A LUNATIC—NECESSARIES—ARTICLES OF LUXURY.—1. During the temporary confinement of the defendant in a lunatic asylum, his wife hired a pianoforte, and purchased a piannette, from the plaintiffs on credit, for an expensive residence in London, which the defendant had taken previous to his infirmity. The defendant was possessed of a considerable estate, the entire income derived from which his wife was in receipt of, same being abundant for the maintenance of herself and their family. *Held*, that although where a husband is a lunatic, and living separate from his wife, she possesses an implied authority to pledge his credit for goods strictly necessary for her maintenance, the defendant was not liable in respect of the articles hired and purchased, as they were not necessaries, and his wife was in receipt of his whole income, same, though exceeded, being sufficient to support herself and family. 2. *Semble*, that he would not have been liable even for necessaries supplied on credit, in the absence of a finding by the jury of express authority given, as his income, wholly received by his wife, was so adequate and ample.—*Chappell v. Nun.* Irish High Court of Justice, Queen's Bench Div., 13 Ir. L. T. Rep. 104.

ACTION FOR PENALTY — PRIOR JUDGMENT OBTAINED BY COVIN AND COLLUSION — A writ having been issued in an action for the recovery of a penalty under the 21 Geo. 3 c. 49 s, 1, the defendants procured another action to be brought against them for the same and further penalties by a friendly informer who was ignorant of the earlier writ. The friendly informer took no real part in the action brought in his name, but intrusted the conduct of it to the defendants' solicitor. The defendants suffered judgment by default in the friendly action, in order to protect themselves by using it in an answer to the hostile action and any other actions which might be brought for the same penalties.—*Gladstone v. Brighton Aquarium Assn.* English Court of Appeal, 27 W. R. 523.

ABSTRACTS OF RECENT DECISIONS.

SUPREME JUDICIAL COURT OF MASSACHUSETTS.

June, 1879.

WRIT OF MANDAMUS—RIGHT OF PURCHASER OF SHARES IN A CORPORATION. — Where officers of a railroad corporation have sold stock thereof at public auction for non-payment of an assessment thereon, a writ of *mandamus* will not be granted to compel them to transfer on the books of the corporation and issue a certificate for said stock to a purchaser thereof at said auction. Murray v. Stevens, 110 Mass. 95; American Railway Frog Co. v. Haven, 101 Mass. 398, distinguished, and Queen v. Shropshire Union Railway, L. R. 8 Q. B. 420, explained. Opinion by GRAY, C. J.—*Stackpole v. Seymour.*

PROMISSORY NOTE — LORD'S DAY ACT.—B, the agent of F, who was out of the State, received from F a note of the defendant, which was almost outlawed, with a request that he would call upon the defendant and collect said note or get him to sign a new one. B called upon the defendant on a Thursday and stated the request, and the defendant said he could not pay that day, but promised to call upon B before the next Saturday night and pay the old note or sign the new one. The defendant called upon B the following Sunday morning, asked to take the new note and promised if it was all right to sign and return it Monday morning. He took it away, signed it, and returned it by a messenger to B in the evening of said Sunday. B at first declined to take the note on Sunday, but the messenger complained of the great inconvenience of coming again, and he took it and gave up the old note. A few days after B handed the new note to the wife and daughter of F, who received it upon his return, and some months afterwards indorsed it to the plaintiff, neither of them having the slightest reason to suppose that any of the business relating to said note was transacted on Sunday. The defendant, a few weeks after the new note was given, stated that he made and delivered said note on Sunday to avoid paying his debt. The new note was payable on demand. *Held*, that the transaction was in violation of the Lord's day act, and that neither F nor the plaintiff could maintain an action thereon; and as the defense is allowed, not for the benefit of the defendant, but because the court can not lend its aid to the plaintiff, the defendant's motive in entering into the illegal contract is immaterial. Gen. Stats. ch. 84, § 1; Mosely v. Hatch, 108 Mass. 517; Cranson v. Goss, 107 Mass. 439. Opinion by GRAY, C. J.—*Stevens v. Wood.*

USE OF TRADE-MARKS —WHEN NOT RESTRAINED.—The plaintiff manufactured and sold stoves and ranges, and separate parts thereof to replace those which became worn out or destroyed, using certain names as trade-marks, both by casting them on the stoves and ranges, and by designating them by said names in selling them, and using in the sale of the parts the trade-mark of each stove and range to designate the parts sold for its repair, and also casting on each of said parts the initial letters and number of the trade-mark of the stove or range for which said part was fitted; said numbers applied to stoves and ranges made by the plaintiff and other manufacturers, always corresponding with the number of inches measuring the diameter of the pot-holes. The defendant made similar parts cast in moulds made from the parts sold by the complainant as aforesaid, and had through that means cast on his parts the initial letters and numbers borne by said parts made by the complainant. These parts so made by the defendant were sold by him to replace like parts in the stoves and ranges of the complainant, and were advertised by means of a catalogue which stated that they were manufactured by the defendant, but contained names and numbers used as aforesaid by the complainant. Upon a bill in equity brought to restrain the defendant from using said names and numbers, it was *held*, that as the defendant published to the world the fact that he was the manufacturer of what he sold, and did not attach to his goods any label or mark apt to deceive subsequent purchasers, he could not be regarded as infringing the rights of the plaintiff. Opinion by SOULE, J.—*Magee Furnace Co. v. Le Barrow.*

SUPREME COURT OF NORTH CAROLINA.

June-July, 1879.

LIEN—CONSTRUCTION OF "LABORER."—An overseer is not a laborer, within the meaning of the "Laborers and Mechanics' Lien" law, and has no lien for his wages on the crop or farm of his employer. Opinion by ASHE, J.—*Whitaker v. Smith.*

ASSAULT—WHAT CONSTITUTES.— The prosecutor being at a place where he had a right to be, observed the defendants in conversation and heard a threat to kill him. Soon thereafter the defendants advanced upon him, in an angry manner, with threatening words, each holding a knife in his hand. *Held*, that this was an assault, though the prosecutor left before the defendants got within striking distance. State v. Rawles, 65 N. C. 334, cited and approved. Opinion by ASHE, J.—*State v. Shipman.*

LUNATIC—CREDITORS—MAINTENANCE OF FAMILY.—Property of a lunatic, put into the hands of a committee, is *in custodia legis*, and can not be reached by a creditor for a debt or judgment, prior to the lunacy, except by an order of the superior court, and such order can not be made until first a sufficiency is ascertained and set apart for the maintenance of the lunatic and that of his family if minors. Opinion by DILLARD, J.—*Adams v. Thomas.*

CHARITABLE TRUST—DUTY OF TRUSTEES.— The defendant's testator bequeathed $5,000 in United States bonds to the university, specifying that the income was to be used to defray the tuition, *in perpetuam* of five young men, his descendants having the right to name them; that the fund should not be subject to the debts of the university, and should be kept in United States bonds regardless of rate of interest, and the testator further declared that his object was to found five scholarships. Owing to the reduced rate of interest on United States bonds the income may become insufficient to pay the tuition of five scholars, and the defendant deeming the university should agree to make up the deficiency, declined to pay over until the

court had decided whether the university took the bonds subject to such obligation *Held*, that the point can not be made in this action, the duty of the executor being simply to pay over the bonds unconditionally. Should the income become insufficient to pay the tuition of five scholars, the court expresses the opinion that the testator's intention was to confer a bounty, and not to create a burden, and the university would not have to make up the deficiency either by reducing rates or otherwise, so as to educate five pupils, if the income from the $5,000 of United States bonds should become insufficient. Opinion by SMITH, C. J. —*Trustees v. Gatling*.

SUPREME COURT OF MICHIGAN.

June Term, 1879.

MORTGAGE BY TENANTS IN COMMON—CONFLICTING LIENS.—Tenants in common with equal interests of a lot gave jointly a mortgage thereon, and subsequently one of them mortgaged his undivided half to another person, who foreclosed and purchased his mortgagor's interest. Afterwards, the other tenant, having paid more than one-half of the joint mortgage debt, applied for a release of his interest in the mortgaged land, which was given by the assignee of the joint mortgage (complainant herein), knowing of the mortgage given on the other undivided half: *Held*, that this did not entitle the mortgagee of the undivided half to have complainant's lien on that half under the joint mortgage postponed to his own. This would make one tenant, by having the misfortune to be joint owner with another of a mortgaged lot, liable to have his property sold to pay the other's subsequent mortgage. Opinion by COOLEY, J.—*Southworth v. Parker*.

AGREEMENT, ORIGINAL OR AS SURETY—STATUTE OF FRAUDS.—B engaged C to provide materials and do certain work for him on a building, and C agreed with third persons to supply him the material for a certain sum, whereupon they furnished him with a portion of the material upon his credit, and afterwards supplied the residue directly to B, after informing him, as they claim, that they had concluded not to deliver any more under their former arrangement with C. *Held*, on action brought by said third persons against B: 1. That the fact that C had previously agreed with plaintiffs for the same things and for the same use, and was not aware that they were resolved not to act further under it, was not incompatible with a valid dealing between these parties on their own ground and apart from the contract relations between plaintiffs and C. 2. That if such was the case, defendant's promise was as principal and not as guarantor or surety, and he was bound by it; but if the parties contemplated that the articles should be furnished under the agreement which had been made with C, and that defendant should be bound to pay in case C did not, defendant was only a surety, and was not bound for want of writing. Opinion by GRAVES, J.—*Ingersoll v. Baker*.

CHATTEL MORTGAGE — COVENANT TO KEEP UP STOCK—CONTINUANCE OF MORTGAGE AS SECURITY —ADMISSIONS AGAINST INTEREST — EFFECT OF SALE BY CHATTEL MORTGAGOR.—1. A chattel mortgage upon a stock of goods in store may covenant that goods shall be put in to keep up the stock, and it will cover goods so put in. People v. Bristol, 35 Mich. 28; American Cigar Co. v. Foster, 36 Mich. 368. 2. Where a mortgage is made to secure a note, and a few months before it becomes due a new note for a reduced amount is given, payable twelve months after date, and the old one is given up, the question whether the mortgage continues as security for this new note is one of fact for the jury; and evidence that the mortgagee before he transferred his title to complainant, reported as a commercial reporter in 1876 (while the old note was running), that the stock was mortgaged for $1,150, and in the next year (when the old note had been given up) that the stock was clear, was original evidence to prove admissions inconsistent with the existence of any mortgage. They were against his interest. 3. A general sale of a chattel mortgagor's interest does not give an immediate right to replevy without demand. The mortgagee's right to take possession is optional, and the mortgagee can not be in fault for not delivering up what is not demanded. Opinion by CAMPBELL, C. J.—*Cadwell v. Pray*.

SUPREME COURT OF ILLINOIS.

[Filed at Ottawa June 21, 1879.]

NEGLIGENCE — WALKING ON TRACK OF RAILROAD — FAILURE TO LOOK FOR APPROACHING TRAINS.—This action was brought by a widow, as administrator of the estate of her deceased husband, against a railroad company, to recover damages for his death, which was caused by an engine of the company running over him. Verdict below for the defendant. Plaintiff appeals. It appears that the deceased was acquainted with the locality of the accident; that he was walking at the intersection of two railroad tracks, upon each of which a train was approaching; that he stepped off of one track on to th other, within ten feet of an approaching engine, and that the engineer was not ringing the bell of the engine; and that he was knocked down by the same, and that he died shortly afterwards. SHELDON, J., says: "Upon the facts of this case we do not see any right of recovery. It appears that the deceased was walking along the track of defendant's road, and placed himself in the position of danger. He did this without using any precaution whatever to ascertain whether or not there was any engine or train approaching on the track. Negligence and inattention in voluntarily and needlessly going into a place of danger are not to be excused. The greater the danger the higher the care and caution which should be exercised to avoid it. This court has repeatedly held that to walk upon the track of a railroad without looking in both directions to discover approaching engines or trains, when the exercise of such precautions would discover either the one or the other, is such negligence as will preclude a recovery, unless the injury be willfully or wantonly inflicted by the defendant. 46 Ill. 82; 52 Ill. 325; 64 Ill. 510; 81 Ill. 45; 70 Ill. 106; 87 Ill. 529; 72 Ill. 222; 83 Ill. 510." Affirmed.—*Austin v. Chicago, etc. R. Co.*

DEBT ON BOND — GUARANTEE OF MARRIED WOMAN — RIGHT OF THIRD PARTY TO PLEAD COVERTURE.—This was an action of debt brought by Mary A. Giles against the defendants on a bond in which one of the defendants, Ricketson, was principal, and the other defendant, Bradley, was surety, conditioned that "if the above bounden Ricketson, his heirs, etc., shall well and truly pay or caused to be paid any and every indebtedness or liability now existing or which may hereafter in any manner exist or be incurred on the part of said Ricketson to the said Mary A. Giles, then this obligation to be void." It appears that after the making of the above writing, and before the commencement of this suit, Ricketson gave two promissory notes to the Singer Man. Co., the payment of which was guaranteed by plaintiff at the special instance and request of Ricketson; that the notes were

not paid when due, but that plaintiff was obliged to pay the same. Plaintiff recovered, and defendants appealed. It is first contended that as the plaintiff was, at the time of the guarantee, a married woman, the contract of guarantee was not binding upon her, and if she voluntarily paid the notes she can not recover the amount so paid from the defendant. The court say: "We shall not stop to inquire whether the plaintiff could have defeated a recovery on her contract of guarantee by a plea of coverture if she had interposed that defense; because such a defense if it existed was personal to her, and if she failed to take advantage of it the defendants in this action are in no position to invoke her right to aid them here. If a *feme covert* should sign a note as surety and fail to plead coverture when sued, but permit judgment to pass and afterwards pay the debt, the principal on the note when sued by her to recover back the money paid for him, could not shield himself behind the fact that she might have relied upon coverture when originally sued." Affirmed.—*Ricketson v. Giles.*

BOOK NOTICES.

CASES ARGUED AND DETERMINED in the St. Louis Court of Appeals of the State of Missouri, From December 18, 1877, to April, 23, 1878. Reported by A. MOORE BERRY. Vol. 5. St. Louis: F. H. Thomas & Co. 1879.

REPORTS OF CASES DETERMINED in the Supreme Court of Nevada during the year 1878. CHARLES F. BICKNELL and THOMAS P. HAWLEY, Reporters. Vol. 13. San Francisco: A. L. Bancroft & Co. 1879.

The fifth volume of this series is fully up to the standard of the last two, and the typographical part equal to all the previous volumes. It contains 639 pages, and among them are many decisions of general importance and interest, most of which, however, have been already referred to in these columns. The bar of other States have, no doubt, by this time discovered that these reports are of the greatest value in practice, containing, as they do, so many cases on commercial law, and on questions of every day importance. The ability of the bench, whose judgments are here reported, is known throughout the country, and the Missouri Appeal Reports have come to be quoted very extensively.

The thirteenth volume of the Nevada reports contains not very many cases of interest in this section. The following cases are an exception to this: An undertaking on appeal signed on Sunday is valid; it is not "transacting judicial business," within the meaning of the statute. *State v. California Mining Co.* An order in the form of an inland bill of exchange not upon any particular fund, is not, before acceptance, an assignment, and does not create any lien in favor of the holder upon funds of the drawer in the hands of the drawee. *Jones v. Pacific Wood Co.* The warden of the State prison has authority to employ a physician under a power to appoint "all necessary help." *State v. Hobart.*. The work of the Nevada reporter seems to be well executed, with the exception of the *syllabi*, which are, in almost every case, both lengthy and argumentative—qualities not at all essential, and which had better be dispensed with.

NOTES.

"An action," says an exchange, "is now being tried at Washington, in which the plaintiff claims the recovery of his own legs. The surgeon who amputated them considered them his prequisites, placed them in spirits, and exhibited them in the local museum. The original owner was annoyed at having his name labelled on the jar, and hence the action."——Mr. Justice Bramwell, of the English Bench, in the course of a recent trial, laid down the complete duty of the solicitor in regard to embarking his client in litigation. He said that "the duty of a solicitor was something like that of a doctor—to keep one well if he could, not to make one ill and then cure one. Whichever party to this action won, the solicitor would perhaps say to his client, "You see I pulled you through," and if he were the client he would say, "You oughtn't to have let me get into it at first." It was manifest that a little good sense and good advice on the part of those who had advised the plaintiff in this cause would have prevented the bringing of such a futile, fruitless, worthless action as that. Here they had had their time consumed about a case which was really of no moment. Perhaps he had no right to complain, neither perhaps the jury, because they had the right to torture twelve of their fellow-citizens on some future occasion.

The second annual meeting of the American Bar Association was held at Saratoga, New York, on the 20th ult. The proceedings were opened by the address of the retiring president, Hon. James O. Broadhead, of this city, on the changes of the statute law made in the several States and by Congress during the last year. Over two hundred new members were elected. The reports of the secretary and treasurer were read and accepted. The report of the treasurer showed the receipts of the last year to have been $1,065.10, and the disbursements $390 23, showing a balance on hand of $734.87. The report of the executive committee was read and accepted. Hon. Calvin G. Childs, of Connecticut, read an essay on "Shifting Uses from the Standpoint of the Nineteenth Century." The evening session was opened by the election of members of the general council for the ensuing year. The following named gentlemen were announced as constituting such council: A. M. Rhodes, A. P. Hyde, J. Hubley Ashton, Geo. A. Mercer, Thos. Hoyne, Azro Dyer, Jas. S. Pertle, Carleton Hunt, Skipwith Wilner, Edmond H. Bennett, O'Brien J. Atkinson, Jos. Shippen, Chas. S. Manderson, John M. Shirley, John W. Taylor, E. F. Bullard, William T. McClintock, Thos. E. Franklin, Luke P. Poland, Robt. Ould, John J. Hutchinson, Almond A. Stroud. Mr. Henry Hitchcock, of St. Louis, read a paper on "The Inviolability of Telegrams." Mr. Geo. Mercer, of Savannah, read a paper on "The Relationship of Law and National Spirit." A resolution amending article 4 of the constitution, transferring the election of members to the General Council, was adopted. The association re-convened on Tuesday morning. The session was opened by E. J. Phelps, Esq., of Vermont, who delivered the annual address, taking for his subject "Chief Justice Marshall, and the Constitutional Law of his time." The election of officer for the ensuing year resulted as follows: President—Hon. Benjamin H. Bristow, of Kentucky. Vice-Presidents—Thomas H. Watts, Ala.; John J. Horner, Ark.; John N. Pomeroy, Cal.; Origen S. Seymour, Conn.; H. H. Wells, D. C.; Anthony Higgins, Del.; A. R. Lawton, Ga.; Thomas Hoyne, Ill.; Thos. A. Hendricks, Ind.; W. G. Hammond, Iowa; Wm. Preston, Ky.; F. P. Poche, La.; R. J. Gittings, Md.; Nathan Webb, Me.; Wm. Gaston, Mass.; Thos. M. Crowley, Mich.; Jas. T. Harrison, Miss.; Henry Hitchcock, Mo.; Jas. Woolworth, Neb.; Gilman Marston, N.; A. Q. Keasbey, N. J.; Clarkson N. Potter, N. Y.; Rufus King, Ohio; Geo. W. Biddle, Penn.; Charles L. Bradley, R. I.; Robert Ould, Va.; E. J. Phelps, Vt. Secretary—E. O. Hinkley, of Maryland. Treasurer—Francis Rawle, of Pennsylvania.